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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEX FRANKIE DUARTE,

Defendant and Appellant.

2d Crim. No. B293183
(Super. Ct. No. 2017025530)
(Ventura County)

Appellant Alex Frankie Duarte and co-defendant Terry Lee Stephenson were charged with second degree robbery (Pen. Code, § 211). Appellant pled guilty and acknowledged he could be sent to prison for a maximum of five years. The trial court suspended imposition of sentence and placed appellant on 36 months of formal probation. Appellant was ordered to serve 365 days in jail with 165 days of custody credit. He also was ordered to report to probation as directed, to participate in any treatment program directed by probation, to submit to chemical testing upon demand, and to not use or possess any controlled substances.

Appellant was released from jail on January 18, 2018.¹ After two unsuccessful attempts at probation, the trial court revoked and terminated probation on September 17. It sentenced appellant to the middle term of three years in state prison with 372 days of custody credit.

Appellant contends the trial court abused its discretion by revoking probation and sentencing him to prison. He claims the court's failure to provide him "with one more opportunity to seek residential drug treatment was a showing of abusive or arbitrary action." We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 27, the Ventura County Probation Agency filed a notice of alleged probation violations against appellant, including failure to report to probation as directed, use of methamphetamine five days after release from jail, three positive tests for methamphetamine, failure to report for random drug testing and failure to participate in a residential drug treatment program. Noting that appellant's "performance on probation [was] atrocious," the deputy probation officer, Amelia Guerrero, considered recommending prison, but instead requested "one more attempt at rehabilitation."

After appellant admitted the violations, probation was revoked, reinstated and modified on the condition that he serve 60 days in jail. The trial court stated: "Mr. Duarte, this is your last chance on probation. Next time I'm just going to send you to prison."

On June 8, the Ventura County Probation Agency filed another notice of alleged probation violations. The deputy probation officer, Melissa Gomoll, noted that appellant "continues

¹ All referenced dates are in 2018.

with the same behavior he engaged in at the time of his last probation violation hearing He has reported sporadically and continued with his drug use. He was given the opportunity to participate in random drug testing, however, he failed to report [altogether] to probation.”

Appellant denied the allegations. At a contested hearing, Deputy Sheriff Laura Sedillos testified that she contacted appellant on January 26. Appellant, who appeared to be under the influence of a controlled substance, admitted using methamphetamine three days earlier. After Sedillos arrested appellant for a violation of Health and Safety Code section 11550, subdivision (a), he tested positive for methamphetamine.

Gomoll testified that appellant failed to report to probation on five occasions in April and May, and that he missed drug testing on those occasions. Appellant admitted to using methamphetamine on April 7, May 1 and May 3.

Noting that appellant has “a serious drug problem,” Gomoll directed appellant to enter a residential treatment program. After appellant participated in a detox program at Khepera House (Khepera), Gomoll told him to stay at Khepera for residential treatment. She learned there was an available bed, but appellant elected to leave. Gomoll did not believe appellant was trying to get help for his drug addiction.

The trial court determined the evidence “establishes convincingly” that appellant violated probation by failing to regularly report to probation, by failing to submit to chemical testing, by failing to participate in a residential drug treatment program and by using controlled substances. The court also noted appellant has a significant criminal history and is at high

risk to reoffend based on a recent Ohio Risk Assessment System (ORAS) screening.

The trial court revoked probation as unsuccessful and imposed the three-year prison term. It stated: “In my opinion [probation] should not have been granted in the first place on terms like this. But it was. And [appellant] had at least two major opportunities to comply and failed to do so.”

DISCUSSION

“Sentencing choices such as the one at issue here, whether to reinstate probation or sentence a defendant to prison, are reviewed for abuse of discretion. ‘A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.’” (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910 (*Downey*)). It is the defendant’s burden to demonstrate an abuse of discretion. (*People v. Vanella* (1968) 265 Cal.App.2d 463, 469.) “In the absence of any showing that the court’s decision was arbitrary or capricious, we will uphold it on appeal.” (*Downey*, at p. 910.)

Appellant maintains his probation violations “were all directly attributable to [his] substance abuse issues, rather than a conscious disregard of the trial court’s orders.” He notes that Gomoll recommended in her June 8 report that appellant be given another opportunity on probation, on the condition that he either serve 90 days in custody, or receive a 30-day custody sanction to be followed by a residential drug treatment program. Appellant contends the trial court abused its discretion by rejecting this recommendation.

As the People point out, the trial court properly considered the probation officers' reports, but "[i]t was not . . . required to follow the recommendations in those reports." (*Downey, supra*, 82 Cal.App.4th at p. 910; accord *People v. Warner* (1978) 20 Cal.3d 678, 683, superseded by statute on another ground as stated in *People v. Douglas* (1999) 20 Cal.4th 85, 92, fn. 6.) "Such . . . recommendation[s] [are] advisory only, provided in order to aid the sentencing court in determining an appropriate disposition, and may be rejected in [their] entirety." (*People v. Delson* (1984) 161 Cal.App.3d 56, 63.)

In both probation reports, the probation officer expressed skepticism regarding appellant's willingness or ability to address his drug addiction. In the February 27 report, Guerrero noted appellant had completed one week of detox at Khepera, but "following his completion of detox he declined the bed in Khepera and failed to follow through with the Rescue Mission." Guerrero considered recommending prison, but requested "one more attempt at rehabilitation." The trial court accepted that recommendation, but told appellant it was his "last chance on probation. Next time I'm just going to send you to prison."

History repeated itself when appellant was again released from jail. After committing a number of additional probation violations, appellant reentered the detox program at Khepera but refused to stay for residential treatment, saying he "had things to do." As Gomoll noted in her June 8 report, "[i]t appears at this juncture that the defendant does not have any intention of entering residential treatment. Placing him into custody was the only option to force continued sobriety."

Under these circumstances, the trial court acted well within its discretion in declining to give appellant a third chance

at probation. It is apparent, based on appellant's behavior, "that he was not committed to giving up the use of drugs and that he constituted a danger to himself and to the public." (*Downey, supra*, 82 Cal.App.4th at p. 917.) As the court observed, appellant has a substantial criminal record, including the underlying robbery, and his ORAS screening placed him at high risk to reoffend in the community. Appellant's track record confirms his inability to comply with the law and constitutes ample grounds for revocation of probation and commitment to state prison.

DISPOSITION

The judgment (order revoking probation and imposing sentence) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Jeffrey G. Bennett, Judge
Superior Court County of Ventura

Earl E. Conaway, III, under appointment by the Court of
Appeal, for Defendant and Appellant.

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